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SUPREME COURT, U.S.

NO. 80-6345

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CRAWFORD BULLOCK, JR.,
Petitioner

VS.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHERE PETITIONER ADMITS HE HAS NEVER PRESENTED CLAIMS OF INEFFECTIVENESS OF COUNSEL TO THE COURT BELOW THIS COURT IS WITHOUT JURISDICTION TO DECIDE THE ISSUE AND CERTIORARI SHOULD BE DENIED.

II.

WHERE PETITIONER ADMITS HE DID NOT PRESENT HIS CLAIMS IN THE CONTEXT OF DUE PROCESS OF LAW TO THE COURT BELOW THIS COURT IS WITHOUT JURISDICTION TO DECIDE THE ISSUE AND CERTIORARI SHOULD BE DENIED.

III.

WHERE PETITIONER ADMITS HE NEVER RAISED HIS EQUAL PROTECTION CLAIM IN THE COURT BELOW THIS COURT IS WITHOUT JURISDICTION TO DECIDE THE ISSUE AND CERTIORARI SHOULD BE DENIED.

IV.

WHERE A LACK OF INTENT IS BEFORE THE SENTENCING AUTHORITY FOR CONSIDERATION IN A MITIGATING POSTURE AND THE COURT BELOW CONDUCTS A PROPER COMPARATIVE REVIEW OF THE SENTENCE, A SENTENCE OF DEATH WITHOUT A FINDING THAT PETITIONER INTENDED TO EFFECT THE DEATH OF HIS VICTIM DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS AND CERTIORARI SHOULD BE DENIED.

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BRIEF IN OPPOSITION

Respondents, State of Mississippi, respectfully prays that the petition for writ of certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Crawford Bullock, Jr., v. State of Mississippi, 391 So.2d 601 (Miss.1980). Rehearing was denied on January 14, 1981. A copy of the opinion is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Petitioner, Crawford Bullock, Jr., was indicted for the crime of capital murder by the Grand Jury for the First Judicial District of Hinds County, Mississippi during the November 1978 Term. The indictment grew out of the September 22, 1978 slaying of Mark Dickson by petitioner and Ricky Tucker.

Petitioner was tried during the May 1979 Term of the Hinds County Circuit Court. Petitioner's bifurcated trial was conducted under the procedures mandated by the Mississippi Supreme Court in Jackson v. State, 337 So.2d 1242 (Miss.1976) and Section 99-19-101 to 107, Mississippi Code Ann. (Supp.1980). At the conclusion of the guilt phase of the bifurcated trial, the jury, after proper instruction, retired to consider their verdict. After deliberation the jury returned a verdict of guilty of capital murder. The trial then proceeded into the punishment or sentencing phase. After hearing additional evidence and being properly instructed the jury retired to consider the sentence. The jury returned a sentence of death in the proper form.

On automatic review to the Mississippi Supreme Court the conviction and sentence of death was affirmed by a unanimous court on August 6, 1980. Bullock v. State, 391 So.2d 601 (Miss.1980). A timely petition for rehearing was filed by petitioner. The Court called for additional briefs from the State. After consideration of the briefs the court below denied rehearing on January 14, 1981.

On March 20, 1981 the State court was moved to stay execution of sentence pending the outcome of the present petition to this Court. On April 1, 1981 the court below stayed execution pending disposition of the petition for writ of certiorari filed in this Court.

The facts as reflected in the record, show that on the evening of September 21, 1978 Crawford Bullock and Ricky Tucker went to Town Creek Saloon in Jackson, Mississippi. Bullock was observed drinking there during the night. When the bar closed in the early hours of September 22, they found that the person they came with had left them. The deceased, Mark Dickson, was also leaving and offered to give them a ride home in the gray Thunderbird automobile he was driving. The car belonged to a friend and the license plates were in the rear seat that evening.

On the way home Bullock had Dickson stop at a convience store to buy some bread. Dickson gave Bullock thirty-five cents to buy the bread. The money was returned when it was found the store had no bread.

Dickson drove on at his rider instructions. Bullock asked him to stop so he could relieve himself. When Bullock returned to the car he overheard an argument between Tucker and Dickson. Tucker said "Don't make me pull this gun," and Dickson replied that he did not have any money but that they could take the automobile. Dickson was ordered back into the car and instructed where to drive. The argument continued. Dickson stopped the car on Byrd drive near the overpass under construction on West Capitol Street. Blows were exchanged between Tucker and Dickson. Tucker told Bullock to grab Dickson, which he did. Dickson broke free and left the car. Tucker got out of the car with a whiskey bottle. He advanced on Dickson who fled with Tucker in pursuit. Dickson was tackled by Tucker. Bullock caught up with them. [He was slowed by a cast on his leg.] Bullock grabbed Dickson by the hair and held him for Tucker. Tucker hit Dickson in the head with the whiskey bottle which also hit Bullock's hand, broke and cut it. Dickson was beaten to the ground where petitioner and Tucker proceeded to crush his skull with large pieces of concrete found in the area.

Dickson was then loaded into the car and Bullock drove Dickson's car to a car wash where the blood was washed away. Dickson's wallet was searched and when no money was found it was disposed of. Bullock then drove the car to the Star Service Station to get gas. From there they went to Bullock's house where they cleaned up and obtained a garden hose.

Bullock then drove them to a lake in Byram he knew of where Dickson's outer clothing was removed and his body trussed with the garden hose. His body was dragged to the edge of the lake by Bullock and Tucker where a boat was found. The boat was chained and locked. Dickson's body was weighted down by placing concrete rocks in his under clothing. Tucker took the body out into the lake as Bullock had a cast on his leg. The body was submerged and when Tucker had trouble getting everthing secure he called for help and Bullock went into the water to aid him.

They left the lake drove back to Jackson, cleaned up again at Bullock's house then went to seek medical attention at University Medical Center. Bullock's hand was stiched. The next day Bullock and Tucker drove to McComb supposedly to see Bullock's grandfather. They did not find him.

During the early morning hours of September 23, 1978 Bullock's hand began to trouble him so he returned to University Medical Center in the gray T-Bird, where he obtained some prescriptions. On his way home from the hospital he was apprehended by the police. The license plate that had been in the back seat on the night of the murder was now on the tag mount outside the car.

REASONS FOR DENYING THE WRIT

Petitioner attempts to raise several issues for the first time on this petition. He freely admits that he has not raised most of the issues presented here in the section of his petition entitled "How Federal Questions Raised And Answered Below." (Petition at 2-3) This being the case this Court has no jurisdiction to decide those issues. Those issues raised and decided below present no questions of substance as they involve no denial of rights guaranteed by the Constitution of the United States, Amendments Six, Eight and Fourteen.

Since this is a death penalty case respondents will speak to each issue briefly and show wherein each is not proper for decision here or is without merit.

I.

Under petitioner's Reason I he raises, for the first time, the allegation that he was denied effective assistance of counsel at trial and on appeal. He separates this argument into four distinct points none of which are proper for determination by this Court as they have never been presented to the state court for determination. Under the rational of Cardinale v. Lousiana, 394 U.S. 437 (1969), this Court lacks jurisdiction to decide these issues as they were never presented to the state courts or were not presented in a federal constitutional context.

Petitioner claims in I(a) that the Supreme Court of Mississippi would have decided his case differently had they been presented a transcript of the sentencing phase in the trial of his accomplice Ricky Tucker.[1/] The court below mentioned the lack of such a transcript, but further states that it would not be determinative

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1/ Tucker was tried after petitioner, he was convicted of capital murder and sentenced to life by the jury. Tucker did not appeal his conviction and sentence.

of the issue of sentence. The court said:

> In the case at bar, there is no record of the aggravating circumstances and mitigating circumstances in the trial of Tucker, and it is not possible to determine what circumstances influenced the jury in its life verdict. The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender. Jones v. State, 307 So.2d 549 (Miss.1975); Bass v. State, 231 So.2d 495 (Miss.1970); McBroom v. State, 217 Miss. 338, 64 So.2d 144 (1953).
>
> When we compare the present case to other capital cases, which have been affirmed by this Court on the death penalty, the present robbery-murder is equally as wanton, cruel, senseless, heinous and atrocious as those. The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to those crimes so as to require this Court to reduce the sentence to life imprisonment.
>
> 391 So.2d at 614.

Not having been raised below in the context of effective assistance of counsel this Court has no jurisdiction to review an issue that was properly decided below.

Petitioner's reason I(b) is factually incorrect as his trial attorney made two motions for psychiatric examination. Both these motions were sustained. The court below points this out in its opinion. The court stated:

> Appellant says that he was denied a fair trial because the lower court overruled his motions to employ various experts. Appellant filed a motion for psychiatric and psychological examinations at the Jackson Mental Health Center. The motion was granted and an examination was conducted. Appellant then requested that another psychiatrist examine him; the court heard the motion and granted same. The record does not indicate whether the examination was conducted.
>
> 391 So.2d at 607.

There being no error assigned on the basis of psychiatric examination being denied there was no error. The decision to offer an insanity defense was certainly a tactical choice of counsel based on the result of these examinations. This point not

being raised below and further being factually unfounded is not proper for determination here.

Petitioner's point I(c), never raised until now, claims counsel was ineffective because he did not seek to show "the manner in which the District Attorney selects, or chooses, whom he shall seek a death sentence, is selective, inconsistent, capricious, arbitrary and not sought in an even-handed manner under like or similar circumstances." (Petition at 6) The presence of discretion in the processing of capital murder cases was discussed in Gregg v. Georgia, 428 U.S. 153 (1976). The Court said:

> First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons who he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.
>
> The existence of these discretionary stages is not determinative of the issue before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.
>
> 428 U.S. at 199.

This reasoning is further amplified in footnote 50 of the Gregg opinion 428 U.S. at 199.

In the face of the teachings of Gregg, it was not ineffective for counsel not to raise this issue at trial or on appeal. Not being raised below the Court is without jurisdiction to determine the issue.

Petitioner's point I(d) tempts respondent to enter into a lengthy harangue directed at the frivolity of petitioner's arguments. We resist temptation. Petitioner claims counsel was ineffective because he did not argue below that Witherspoon v. Illinois, 391 U.S. 510 (1968) is unconsititutional. Suffice it to say that this Court reaffirmed the rational of Witherspoon and it application to the new bifurcated capital trial procedures in Adams v. Texas, ___ U.S. ___, 65 L.Ed.2d 581, 100 S.Ct. _____ (1980).

II.

Petitioner's second set of allegations claim violation of his right to due process. He cites no authority and only makes general claims of this denial.

He freely admits again that these points were either not raised or not raised in a due process context below. Under the rational of Cardinale v. Louisiana, 394 U.S. 437 (1969), this Court lacks jurisdiction to decide the questions raised here for the first time.

Those issues raised by petitioner that are substantive are not compelling. He claims the introduction of photographs of the deceased denied him due process. He bases this on the claim that his accomplice killed the deceased.

The court below points to facts in evidence that show active participation by petitioner in the death of Mark Dickson. 391 So.2d at 604. Petitioner's arguments as to the photographs and their introduction were correctly decided by the Court below on State grounds and do not present a substantial federal question. 391 So.2d at 607-608.

We are again presented with the argument that Witherspoon v. Illinois, 391 U.S. 510 (1968) is unconstitutional and denies petitioner due process. How absurd!

The fact that petitioner's trial went into the evening hours did not deny him due process, as set forth in the opinion of the court below. 391 So.2d at 611.

III.

Under his point III petitioner raises for the first time that he was denied equal protection because the district attorney has discretion in who shall be put to trial for capital murder. This, not being presented to the court below, is not properly before this Court. In any event, Gregg v. Georgia, 428 U.S. 153 (1976), spoke to this point and the Court found nothing offensive in the discretion present in our legal system. 428 U.S. at 199.

IV.

Petitioner next raises the claim that absent a finding of intent to kill on his part the death sentence cannot be imposed on him. He cites from Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978) as authority for his argument. With all respect to Justice White this was not the holding of the Court.

The specific question raised by this petitioner, as well as other death penalty candidates in Mississippi and a number of other jurisdictions, has never been fully addressed by this Court. In Lockett v. Ohio, 438 U.S. 586 (1978), the petitioner, an aider and abettor to an armed robbery in which the victim was unintentionally shot and killed, was convicted under Ohio law as a principal and was sentenced to death. Although Lockett's death sentence was reversed on other grounds, three members of the Court discussed the issue in separate concurring opinions.

Mr. Justice White expressed the view that the Eight Amendment was violated by imposition of the death penalty "without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at p. 624. Mr. Justice Blackmun expressed a contrary opinion.

> I do not find entirely convincing the disproportionality rule embraced by my Brother White. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robber participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," post, at 628, 57 L.Ed.2d, at 1004, transforms the culpability of those defendants' actions?
>
> Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?

> The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of as ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.
>
> 433 U.S. at p. 614, n. 2 (separate concurrence of Justice Blackmun).

Mr. Justice Rehnquist reached a similar conclusion in more direct terms.

> I finally reject the proposition argued by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what if fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 67 L.Ed.2d, at 1002. Centuries of common-law doctrine dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a thooth for a thooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.
>
> 438 U.S. at pp. 635-36 (separate concurrence of Justice Rehnquist).

Section 99-19-101(6)(d), Miss. Code Ann. (Supp.1980), allows a defendant to introduce evidence that he was only ". . . an accomplice in the capital offense committed by another person and his participation was relatively minor." Petitioner further has the benefit of the Mississippi Supreme Court's ruling in Jackson v. State, 337 So.2d 1242 (Miss.1976), that allows the defendant to produce for consideration by the sentencing jury ". . . proof of any other circumstance or combination of circumstances surrounding his life and character on the commission of the offense with which he is charged that would be reasonably relevant to the question of whether he should suffer death or be sentenced to life in prison." 337 So.2d at 1256. "[T]he only limitation placed on the introduction of evidence of mitigating circumstances is that it must be reasonably relevant." Washington v. State, 361 So.2d 61, 68 (Miss.1978). The degree, nature and character of one's mens rea in regard to the commission of the homicide act, while having little or not outward bearing on the question of guilt under the felony-murder concept, is relevant to the sentencing process and is admissible in Mississippi as a mitigating circumstance.

Sandra Lockett took no physical part in killing the pawn shop owner. She was outside in a car. In the case at bar we have a different situation. The facts as recited by the Court below are:

> Dickson drove on at his riders' instructions. Bullock asked him to stop the automobile in order that he could answer a call of nature. Upon returning to the vehicle, Bullock overheard an argument between Tucker and Dickson and heard Tucker say "Don't make me pull this gun," and he heard Dickson say that he did not have any money but that they could have the automobile. All three reentered the vehicle, the argument continued, and Dickson stopped on Byrd Drive near a construction site where blows were exchanged between Tucker and Dickson. Tucker told appellant to grab Dickson, which he did. Dickson broke away and left the vehicle. Tucker got out with a whiskey bottle, using it as a club, and advanced towards Dickson who fled with Tucker in pursuit. Tucker tackled Dickson; appellant caught up with them and grabbed Dickson by the head.

> Tucker struck Dickson on the head with the whiskey bottle which also hit Bullock's hand, broke and cut it. Tucker beat Dickson with his fists, knocked him to the ground, kicked him in the head as he lay on the ground and then repeatedly struck him with a concrete block on the head which resulted in his death. Appellant went across the street to an automobile agency and tried to start one of the vehicles on the outside of the building to no avail.
>
> 391 So.2d at 604.

Petitioner took an active part in the murder of Mark Dickson. He got out of the car and chased after Mark Dickson even though he had a cast on his leg.

If the procedural benefits and guidelines suggested by Mr. Justice Blackmun's opinion are applicable to a defendant in Lockett's circumstances, it seems equally applicable to a defendant in petitioner's factual situation. The statutory scheme in Mississippi affords the same benefits as far as circumstances in mitigation are concerned. Whether one kills with a conscious and milignant purpose or kills accidentally in the course of a robbery each has the same opportunity to submit to the sentencing authority for its consideration the mitigating circumstances surrounding the murder.

Respondent would submit that petitioner's jury was allowed to consider the intent with which he committed the crime during the sentending phase of the trial. There being no consititutional irregularity certiorari should be denied.

V.

Petitioner's final claim is that his death sentence was "wanton freakish and not inflicted in a consistent and even handed manner under like or similar circumstances." (Petition at 8) A reading of the comparative review made by the Court below will dispell any notion that the Supreme Court of Mississippi did not fully consider petitioner's case and compare the sentence with those in like or similar cases. The court below stated:

> In Coppola v. Commonwealth, 220 Va. ___, 257 S.Ed.2d 797 (1979), the Virginia Supreme Court held that a co-defendant is not necessarily entitled to commutation of the death sentence because an equally culpable accomplice, on substantially the same evidence, has been sentenced to life imprisonment. That Court held that a determination of the proportionability of punishment requires only that the death sentence not be so incommensurate with his conduct, measured by other jury decision, involving similar conduct.
>
> (emphasis added) 391 So.2d at 614.

The Mississippi Court concluded its opinion with the following assessment of the case.

> When we compare the present case to other capital cases, which have been affirmed by this Court on the death penalty, the present robbery-murder is equally as wanton, cruel, senseless, heinous and atrocious as those. The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to those crimes so as to require this Court to reduce the sentence to life imprisonment.
>
> 391 So.2d at 614.

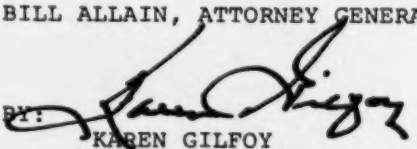
The court below fulfilled its statutory duty of comparison and its affirmance of the death sentence was consistent with cases of like or similar circumstances. Petitioner has presented no grounds upon which certiorari could be granted.

CONCLUSION

For the reasons stated above the Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi should be denied.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL

BY: 

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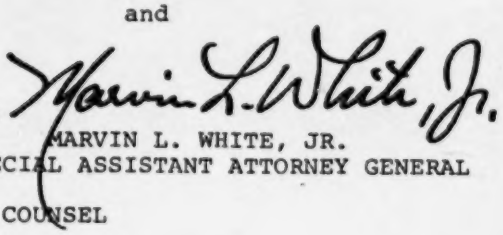
BY: 

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CERTIFICATE

I, Marvin L. White, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari to Percy S. Stanfield, Jr., Esquire, 1439 West Capitol Street, Jackson, Mississippi 39203.

This, the 15th day of May, A.D., 1981.

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